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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 638

MAURICE B. BALDWIN and LA RUBIA M. BALDWIN,
Petitioners,

VERSUS

THE BOARD OF TAX-ROLL CORRECTIONS OF OKLAHOMA COUNTY and W. T. BILL HALE, County Treasurer of Oklahoma County,
Respondents.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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January, 1959.

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SUBJECT INDEX

	PAGE
Opinion of Court Below	1
Grounds of Jurisdiction	1
i. Date of Judgment	1
ii. Denial of Rehearing and Orders Fixing Time to Appeal	2
iii. Statutory Jurisdiction and Grounds	2
Questions Presented for Review	4
Constitutional Provisions and Statutes Involved	5
Statement of Material Facts	7
Argument	10
1. Meaning of the provision, "reserved for its use"	10
2. The enactment exempting property not already immune from State taxation is within the constitutional prerogatives of the Congress	20
3. The exemption of the property from taxation by Federal statute operated to confer a right and privilege upon the petitioners as an incident of their ownership and the State Courts were obliged to give effect to that exemption	21
Conclusion	22
Appendix A (Opinion of Okla. Supreme Court)	i
Syllabi	i
Judgment	ii
Opinion	ii

INDEX CONTINUED PAGE

INDEX TO AUTHORITIES

CONSTITUTIONAL PROVISIONS:

United States Constitution:

Article I, Sec. 8, Clause 7 20
Article VI, Clause 2 ..... 4, 5, 9, 22
Amendment XIV 21

Oklahoma Constitution:

Article I, Sec. 3 ..... 6, 20

FEDERAL STATUTES:

Act of Cong., March 3, 1845; 5 Stat. 742 16
do. February 22, 1889; 25 Stat. 677 ..... 13, 15
do. July 3, 1890; 26 Stat. 215 14
do. July 10, 1890; 26 Stat. 222 14
do. July 16, 1894; 28 Stat. 107 14
Oklahoma Enabling Act—Act of Cong., June 16, 1906; 34 Stat. 269 ..... 5, 8, 9, 10, 11, 17, 20
Act of Cong., June 20, 1909; 36 Stat. 557 14
28 U.S.C., Sec. 1257(3) 2, 3

STATE STATUTES:

68 Okla. Stat. 1951, Sec. 15.3 16
Laws of Okla., 1955, p. 377 17

MISCELLANEOUS:

19 Opinions U. S. Atty. Gen. 161, 169 13
19 Cong. Record 691, 2831-2832 13
19 Cong. Record 3139 13
20 Cong. Record 806-808 13

COURT DECISIONS:

Allen v. Henshaw, 197 Okla. 123, 168 P.2d 625 ..... 17, 21

INDEX CONTINUED

PAGE

Baldwin v. Board of Tax-Roll Corrections (Okla.), 331 P.2d 412 ..... 1, 9, 10, 12
Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U.S. 375 16
Board of County Commissioners v. Seber, 318 U.S. 705, 130 F.2d 663 20
Board of County Comm'rs v. Tulsa Business College, 150 Okla. 197, 1 P.2d 351 18
Boss v. Polk County, 236 Iowa 394, 19 N.W.2d 225 16

Carpenter v. Shaw, 280 U.S. 363 21
Chicago, R. I. & P. R. Co. v. State, 346 U.S. 574, reh. den., 347 U.S. 924 7
Choate v. Trapp, 224 U.S. 665 21
Cornelius v. Jackson, 201 Okla. 667, 209 P.2d 166 17
Cox v. Dillingham, 199 Okla. 161, 184 P.2d 976 18
Coyle v. Smith, 221 U.S. 559 20

Davis v. Taylor, 194 Okla. 565, 153 P.2d 231 16

Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95 ..... 3, 20

Hales v. Lee, 199 Okla. 110, 184 P.2d 451 17

McDonald v. Duckworth, 197 Okla. 576, 173 P.2d 436 17

Pittman v. Home Owners' Loan Corp., 308 U.S. 21 ..... 3, 20
Protest of Hyde, 188 Okla. 413, 110 P.2d 292 18

Scott v. Society, etc., 59 Neb. 571, 81 N.W. 624 19
S. R. A. v. State of Minnesota, 327 U.S. 558 16
State v. Shamblin, 185 Okla. 126, 90 P.2d 1053 16

Testa v. Katt, 330 U.S. 386 22

United States v. Allegheny County, 322 U.S. 174 ..... 19, 20
United States v. Rickert, 188 U.S. 432 15

Van Brocklin v. Anderson, 117 U.S. 151 ..... 12, 13, 14, 15

INDEX CONTINUED

PAGE

Ward v. Board of County Commissioners of Love County, 253 U.S. 17 ..... 3, 21, 22

Washburn College v. Shawnee County, 8 Kan. 344 22

Wisconsin Central R. Co. v. Price County, 133 U.S. 496 14

In the
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OCTOBER TERM, 1958

No. .....

MAURICE B. BALDWIN and LA RISSA M. BALDWIN,
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THE BOARD OF TAX-ROLL CORRECTIONS OF OKLAHOMA COUNTY and W. T. BILL HALE, County Treasurer of Oklahoma County,
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CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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OPINION OF COURT BELOW

The opinion of the Supreme Court of Oklahoma in this cause is officially reported in 331 P.2d 412. A copy of said opinion is appended hereto as Appendix A.

GROUNDS OF JURISDICTION

(i) *Date of Judgment.* The judgment of the Supreme Court of Oklahoma preceded the opinion proper (see Appendix A) and was entered on September 16, 1958.

(ii) *Denial of Rehearing and Orders fixing time to appeal.* Petition for Rehearing was denied October 28, 1958. Whereupon, the judgment became final under Oklahoma practice.

On October 31, 1958, Supersedeas Bond was approved, and enforcement of the Mandate was ordered stayed until December 28, 1958 (only 60 days from denial of rehearing) and until final decision of this Court. On December 23, 1958, the 60 days period abovementioned was extended to January 26, 1959 (the 90 days allowed by Federal statute for appeal or application for certiorari).

(iii) *Statutory jurisdiction and grounds for review.* The jurisdiction of this Court to review the judgment of the Supreme Court of Oklahoma by writ of certiorari is conferred by 28 U.S.C., Sec. 1257(3).

Concisely stated, the grounds on which the jurisdiction of this Court is invoked, to be elaborated hereafter, are the following :

1. The Oklahoma Supreme Court has construed a Federal statute, relating to the State taxation of property utilized by the Federal Government in the performance of its governmental functions, in a manner which, in effect, declares certain language of the Federal statute to be meaningless. The particular Federal statute involved relates solely to taxation by the State of Oklahoma; but identical provisions are contained in the Federal enabling statutes applying to the States of North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, New Mexico and Arizona, whereby the issues here presented are of widespread effect.

2. Neither the construction of the statutory language involved nor its effectiveness have been heretofore determined by this Court; but the prior determinations of this Court in the consideration of legally analogous statutes indicate that the Oklahoma Supreme Court decision is not in accord with the legal principles announced in those decisions.

3. The instant case is entitled to be classified as *publici juris* in that the determination of the meaning of the statutory wording, and the Congressional power so to legislate, substantially affects the cost of Federal governmental operations and, even more importantly, involves the potentiality of direct interference with the functioning of the Federal Government by the State taxing power.

4. The governmental considerations involved are inseparable from the conferral of a private right, privilege and immunity upon the Petitioners by the Federal statute, which the decision of the Oklahoma Supreme Court has denied them. Hence, the issues here presented fundamentally are the same as were reviewed on writ of certiorari in *Ward* v. *Board of County Commissioners of Love County*, 253 U.S. 17, in *Pittman* v. *Home Owners' Loan Corp.*, 308 U.S. 21, and *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95.

To place the matter in statutory (28 U.S.C., Sec. 1257) wording, the Supreme Court of Oklahoma, the highest court of said State in which a decision may be had, denied a right, privilege and immunity especially set up and claimed under a Federal statute enacted pursuant to the consti-

tutional authority of Congress, thereby violating the provisions of Article VI, Clause 2, of the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

FIRST. May the Congress, within its constitutional powers, protect the governmental functioning of the Federal Government, and its ultimate cost, from interference from the impact of State taxing power by legislating that property not owned by the Federal Government but merely reserved for its use be exempt from State taxation during the period of such reservation?

SECOND. Where the wording of a preceding clause in a Federal statute expressly provided for an exemption from State taxation of all property, any title to which the United States had retained (including reservations of right or interest) or might subsequently acquire—both of the foregoing covering any so-called "military reservation" or "mineral reservation", and another preceding clause expressly prohibits State taxation of what commonly is called "Indian Reservations", does not the addition of a clause exempting from State taxation property "reserved for the use" of the Federal Government denote a Congressional intent to extend the tax exemption to property not Federally owned but merely effectively subjected to Federal governmental use to the exclusion of the owner, especially when the history of the development of the legislative provisions shows that the latter addition was inconsistent with mere redundancy?

THIRD. Where a Federal law requires that a State refrain from exercising its taxing power in such manner as to present a potential threat to Federal governmental operations pursuant to the Constitution of the United States, is not the refusal of a State court to give effect to such exemption a violation of Article VI, Clause 2, of the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The principal constitutional provision involved in this case is Clause 2, Article VI, Constitution of the United States, which is as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. The Oklahoma Enabling Act, Act of Congress, June 16, 1906, ch. 3335 (34 Stat. 269), by Section 2 provided for a convention to prepare a constitution for the proposed State. The provisions for the convention are not relevant, being mentioned solely as introductory to that portion of Section 3 of the Act which is involved in the case.

Said Section 3, insofar as is pertinent here, is as follows:

"That the delegates to the convention thus elected shall meet at the seat of government of said Oklahoma Territory * * * and after organization, shall declare on behalf of the people of said proposed State, that they adopt the Constitution of the United States; whereupon the said convention shall, and it is hereby authorized to, form a constitution and State government for said proposed State. The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said convention shall provide in said constitution:

* * * ("First" and "Second" not involved) * * *

"Third. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe or nation; and that until the title to any such public land shall have been extinguished by the United States the same shall be and remain subject to the jurisdiction, disposal and control of the United States. That land belonging to citizens of the United States residing without the limits of said State shall never be taxed at a higher rate than the land belonging to resident thereof; that no taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States *or reserved for its use*" (Emphasis supplied).

3. The Oklahoma Constitution, Article I, Section 3, copies *verbatim* the wording of paragraph "Third" above quoted except that the word "proposed" preceding the word "State" is dropped.

STATEMENT OF MATERIAL FACTS

This case had its inception in an administrative tax proceeding. It reached its judicial stage when Petitioners filed, in the District Court of Oklahoma County, a petition in the nature of an appeal from an order of the Board of Tax-Roll Corrections of Oklahoma County, which order refused the application of Petitioners to strike from the tax rolls of said county a levy of taxes on property belonging to Petitioners, and for findings of fact relating to certain taxes paid by Petitioners on said property whereby Petitioners would have been entitled to a refund of an amount previously paid, under State tax procedure. (See *Chicago, R. I. & P. R. Co.* v. *State*, 346 U.S. 574, *reh. den.*, 347 U.S. 924; also opinion of Oklahoma Supreme Court, Appendix A.)

Petitioners, the owners of certain land with a building thereon in Oklahoma City, on March 11, 1953, entered into a lease with the Postmaster General of the United States whereby said building (except for a separated small room, which fact is not material to the issues here) was leased to the United States of America for a term of 15 years, "to be used exclusively for the following purposes: As and for postal purposes" (R. 22).

The lease was on a standard form of the Post Office Department and its provisions, other than the portion above quoted, have no bearing on the questions presented in this petition. There was incorporated in the lease a provision that "The Lessor shall pay all taxes"; but the lack of materiality of that provision will be treated hereafter. The

latter provision was not made a basis of the decision of the lower court. (See Appendix A.)

The precise taxes involved are for the fiscal years 1955-1956 and 1956-1957.

Notwithstanding the provisions of Section 3 of the Oklahoma Enabling Act, quoted *supra*, and the concurrence therein by the Constitution of Oklahoma, the land and building were assessed for taxation for the year 1955-1956 and taxes in the amount of $2,824.65 were paid by Petitioners. Likewise, the land and building were assessed for taxation for the year 1956-1957 and, prior to date for payment, Petitioners applied to the Board of Tax-Roll Corrections (a) to strike from the 1956-1957 tax rolls that portion of the valuation allocable to the property leased to the United States, and (b) to make findings of fact relating to the taxes paid for 1955-1956 to enable Petitioners to recover that portion allocable to the property leased to the United States.

While the application was pending, by a stipulation the Petitioners paid under protest the 1956-1957 taxes in the amount of $3,074.32.

On hearing before the Board of Tax-Roll Corrections, the Deputy County Assessor testified that the property in question had been assessed as a unit for both years, that he had appraised the value of the property leased to the United States and the portion not covered by the lease at the request of all parties and had apportioned the taxes for the two years between the separate portions, and the taxes paid on that portion covered by the Federal lease

were $2,759.93 for 1955-1956 and $3,003.88 for 1956-1957. There is no controversy over these facts, the Petitioners having sought relief solely upon the legal position that the lease operated to "reserve" to the United States "for its use" that portion of the property covered by the lease (R. 14-15). The provision of the Enabling Act, *supra*, and its counterpart in the Oklahoma Constitution was not literally cited in the application to the administrative board but their wording was copied therein, and they were urged as the source of the asserted exemption.

The Board of Tax-Roll Corrections denied the application and an appeal was taken by Petitioners to the District Court of Oklahoma County by the filing of a Petition therein. This Petition expressly asserted the claim, right and immunity of the Petitioners under the Enabling Act, *supra* (R. 8).

After hearing, the District Court also denied the Petitioners relief. To this judgment, Petitioners filed a Motion for New Trial in which they again expressly set up their claim under the Enabling Act, *supra*, and added the contention that the court's refusal to give effect thereto constituted a violation of the provisions of Article VI, Clause 2, of the Constitution of the United States (R. 31).

On denial of Motion for New Trial, Petitioners appealed to the Supreme Court of Oklahoma and, in the Petition in Error (R. 3-4) again expressly asserted the provisions of the Enabling Act, *supra*, and Article VI, Clause 2, of the Federal Constitution, as controlling.

The decision of the Oklahoma Supreme Court (Appendix A) effectively removed all non-Federal issues from

the case. It was determined that the procedure taken by Petitioners was the proper one for the relief sought, and that they would be entitled to that relief if the wording of the Enabling Act operated to exempt from State taxation property leased to the United States for governmental use. The decision of the Oklahoma Supreme Court was placed squarely upon the construction of the Federal Statute. Referring to the words, "reserved for its use", the Oklahoma Court said:

> "However, we do not deem it necessary to make an unequivocal determination of the exact type and character of the property to which such words refer. We need only decide, and do so decide, that this language is not susceptible to the interpretation which applicants seek to give it."

Following the rendition of the decision of the Oklahoma Supreme Court, Petitioners filed a timely Petition for Rehearing in which the abovementioned Federal statute and Federal constitutional provision again were expressly urged (R. 49-50). This petition was denied by the Oklahoma Court by memorandum order (R. 51), and proceedings were commenced, forthwith, to seek review in this Court, supersedeas bond being approved and filed, and orders were procured staying enforcement of mandate pending perfection of these proceedings (R. 58-59, 60).

ARGUMENT

1. The meaning of the provision, "reserved for its use."

Obviously, the primary consideration involved in the claim of the Petitioners is the meaning of the final clause in paragraph "Third" of Section 3 of the Oklahoma En-

abling Act, *supra*. If the words, "reserved for its use", do not denote a Congressional intent to forbid the State to tax property not Federally owned but merely effectively subjected to Federal governmental use to the exclusion of the owner, then Petitioners' claim must fail.

However, a consideration of the preceding wording of the paragraph, coupled with the familiar rule of statutory construction that all words of a statute should be deemed to have a purpose, and reinforced by the history of the development of this standard provision in Statehood Enabling legislation, leads inevitably to a conclusion that Congress intended to free from the impact of State taxing power all property which the Federal Government deemed necessary for its governmental use, regardless of its ownership.

An analytical examination of the portions of the statute preceding the clause in question will disclose that any State jurisdiction is denied over (1) any unappropriated public lands, (2) any lands owned or *held* by any Indian, tribe or nation, (3) any public land upon which entry had been made but the title of the United States therein had not been extinguished, (4) lands or property belonging to the United States, and (5) lands or property which might be purchased by the United States after enactment of the statute.

The all-inclusive wording of those provisions clearly covers any *title interest* which the United States might have, acquire or retain in property in Oklahoma. It would include all "military reservations" owned or acquired by the Federal Government, and likewise would include pub-

—lic lands reserved for entry because the title thereto would remain unextinguished. Moreover, that wording also would cover the far-fetched possibility mentioned in the Oklahoma Supreme Court opinion of a sale of title with a reservation of a use since such a reservation unquestionably would be "property"—the wording of the statute expressly specifying "property" as well as "lands."

In addition, the wording used completely covered any "Indian Reservations" either by reason of trust ownership by the Government or by reason of the inclusion not only of Indian-owned lands but also of Indian-*held* lands. And further, the terminal clause could not be deemed applicable to this class of property in that it would be for *the use of the Indians* and not of the Government.

So, unless the terminal clause be considered mere redundancy, an interpreter of the Congressional intent must seek a class of property to which the United States has no title interest and in which the element of *use* is the paramount consideration. And the history of the development of Statehood Enabling legislation by the Congress clearly negates any idea that the terminal clause was a mere redundancy.

In the decision of *Van Brocklin* v. *Anderson*, 117 U.S. 151, is contained a most illuminating discussion of the development of such legislation up to the year 1886; and it was pointed out that prior to that time the standard provisions related only to that property which was *immune* from State taxation.

Although the Attorney General had rendered an opinion, in 1888, that the lands of Indian reservations were

owned by the United States, though in trust for the Indians, and therefore immune from State taxation (19 Op. Atty. Gen. 161, 169), no court had so ruled up to that time.

Hence, in the 50th Congress, when the bill (S. 185) was introduced to provide for the admission of North Dakota, South Dakota, Montana and Washington, there was added to the theretofore standard provision, covering the exemption of unquestionably immune property, a provision for the exemption of Indian lands and reservations. A substitute for S. 185 was offered by a minority of the Senate Committee on Territories (19 Cong. Rec. 691, 2831-2832) in which, among other changes, there was first added to the wording relating to State taxation a new clause, "or reserved for its use."

That Committee substitute failed of passage (19 Cong. Rec. 3139); but S. 185 passed the Senate and another substitute was offered in the House (20 Cong. Rec. 806-808) which also contained the new exemption clause; and the Conference Committee report retained that wording, resulting in the passage of the Bill as the Act of Congress, Feb. 22, 1889, ch. 180 (25 Stat. 677).

Although we have been unable to find in Congressional documents or in the Congressional Record any discussion of the reasons for appending this terminal clause to the standard provisions, it is quite significant that the abovementioned statute was the first to add to the provisions which were mere assertions of existing immunity (*Van Brocklin* v. *Anderson, supra*) the positive declaration of an *exemption* of Indian properties and this latter clause which well might include property which would

require *affirmative action for exemption* from State taxation rather than having an inherent immunity.

Not only is the fact that the clause was added to the standard statutory provision significant that it was not mere redundance, but the fact that *Van Brocklin* v. *Anderson, supra,* had been decided just previously, pointing out that the former standard provisions merely reiterated an established immunity, would lend considerable credence to the belief that the Congressional intent in adding the clause was to cover property not inherently immune but desirably exempt for the same practical governmental reasons that made the immunity desirable—*i.e.*, in the words of MR. JUSTICE FIELD, in *Wisconsin Central R. Co.* v. *Price County*, 133 U.S. 496:

> "If the property of the United States could be subjected to taxation by the State, the object and extent of the taxation would be subject to the State's discretion. It might extend to buildings and other property essential to the ordinary business of the national government, and in the enforcement of the tax those buildings might be taken from the possession and use of the United States."

Thereafter, in the Enabling legislation for admission of Idaho (Act of Cong., July 3, 1890; 26 Stat. 215), Wyoming (Act of Cong., July 10, 1890; 26 Stat. 222), Utah (Act of Cong., July 16, 1894; 28 Stat. 107), New Mexico and Arizona (Act of Cong., June 20, 1909; 36 Stat. 557), the clause under discussion was continued in the standard provision relating to exemption from the State taxing power.

In passing, it is significant to note that the only case which has come before this Court which directly involved

the matter of extension of the inherent immunity to subjects requiring affirmative statutory exemption is *United States v. Rickert*, 188 U.S. 432, where the Court found it unnecessary to determine the efficacy of the Congressional legislation, calling attention to the fact that the Constitution of South Dakota, itself, declared the exemption in the same words as the Enabling Act.

In order to give the word, "reserved", the technically legal connotation of applying only to reservations in a conveyance from the United States, it would be required to treat it as a repetition of a previously declared immunity, to ignore the historical data leading up to its intentional addition to the standard statutory provision, and to presume that Congress had no purpose in adding it since the *Van Brocklin* case, *supra*, had already advised the Congress of the inherent immunity of Government-owned property.

It is much more in accord with accepted tenets of statutory construction to assign to the word, "reserve", a common, non-technical meaning and thereby to give an independent effect to the statutory language.

The New Century Dictionary defines the word, "reserved" as "set aside for a particular use or purpose." And Webster's New International Dictionary defines the word as: "Kept or set apart or aside for a future or special use." The word, in its common sense, appears to be firmly wedded to "use."

Taken in this sense the clause would evidence a Congressional intent to extend the political desirability of the immunity from State taxation of Governmentally-owned property to other property needed by the Government

for use in performance of its functions, specifying two elements for the *statutory exemption*, (1) the effective setting aside of the property *to preclude private use*, and (2) the establishment of the *Federal right to use*.

It should be particularly noted that the statutory wording is an exemption from taxation of the *property*, and not of the owner. The governmental use of the property free from the impact of the State's taxing power is the rational objective of the legislation. If the State may effect taxation of the owner, independent of the property, the clause obviously has no application.

In *Boss* v. *Polk County*, 236 Iowa 394, 19 N.W.2d 225, wherein a tax was sustained upon property leased to the United States, there are two distinguishing elements: First, Iowa apparently countenances taxing of the estates of lessors and of lessees separately, since such was the prime basis of the decision in *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore*, 195 U.S. 375, upon which the Iowa decision was predicated, and Second, there is no provision in the Iowa Enabling Act (Act of Cong., March 3, 1845; 5 Stat. 742) comparable to that contained in the Oklahoma Enabling Act, *supra*.

The same elements distinguish the decision in *S.R.A.* v. *State of Minnesota*, 327 U.S. 558.

In Oklahoma, however, taxation of real estate is exclusively *in rem*, and separate interests in real estate may not be separately taxed. (68 Okla. Stat. 1951, Sec. 15.3; *Davis* v. *Taylor*, 194 Okla. 565, 153 P.2d 231; *State* v. *Shamblin*, 185 Okla. 126, 90 P.2d 1053). There is no method

in Oklahoma of subjecting the lessor's interest alone or his contractual rights to receive stipulated rentals, to satisfaction of the tax here sought to be imposed.

The taxing officials, under Oklahoma statutes, could only sell the entire fee title to enforce collection of the tax (*Allen* v. *Henshaw*, 197 Okla. 123, 168 P.2d 625; *McDonald* v. *Duckworth*, 197 Okla. 576, 173 P.2d 436; *Cornelius* v. *Jackson*, 201 Okla. 667, 209 P.2d 166), thereby operating to terminate the Post Office lease and dispossess the Federal Government (*Hales* v. *Lee*, 199 Okla. 110, 184 P.2d 451). And, if such were not done, but the taxes allowed to accumulate for the 15 years' term of the lease, not only would the State taxing officials be subject to penalties for failure to perform their duties, but a portion of the taxes would be extinguished by law (Laws of Okla., 1955, p. 377).

We are not concerned here with the power of Oklahoma to enact legislation which would subject the estate of the lessor to taxation, separate from the Federal leasehold. We are here faced with a tax law which imposes its impact upon the Federal governmental use of the property, a situation which clearly could have been—and from considerations heretofore discussed, probably was—the sort of situation Congress was seeking to avoid in the addition of the terminal clause to the tax exemption provision of the Enabling Act.

It cannot be gainsaid that the lease which Petitioners gave to the United States quite effectively "set aside" the property *for governmental use* for a 15-year period. (It would be quite appropriate to speculate on the dire con-

sequences to the Petitioners should they attempt to exercise any privileges of ownership, such as by entering portions of the building not maintained by the Post Office Department for public access.)

Short of absolute ownership, it would be difficult to conceive of any more effective method of "setting apart" the property for the use of the United States than by the lease executed by the Petitioners and accepted by the Post Office Department.

Even the Oklahoma Supreme Court has consistently followed the doctrine—except in this case alone—that where *use* is the determining factor in a tax exemption, the owner of the property may claim the exemption even though receiving rents or profits. (See: *Cox* v. *Dillingham*, 199 Okla. 161, 184 P.2d 976; *Board of County Comm'rs* v. *Tulsa Business College*, 150 Okla. 197, 1 P.2d 351; *Protest of Hyde*, 188 Okla. 413, 110 P.2d 292.)

Not only from a standpoint of potential deprivation of the leasehold, but from the consideration of the cost of performance of Federal governmental functions, the interpretation we advance is one which logically would have been in the collective Congressional mind when the terminal clause was enacted into Federal law.

Unquestionably, in any situation of negotiation of a lease, the Federal Government will be the ultimate taxpayer if the property be not exempt from State taxation. If the property is to be subjected to recurring State assessments, the owner of the property will endeavor to fix the rentals to be paid at an amount sufficient to cover the taxes

in addition to a return for the use of his property. If he does not do so, he well may become *unable* to pay the taxes—no matter what his contractual obligation to the Government—and involuntarily bring about a situation where the Government must pay the taxes or be dispossessed. So, either way, the Government perforce becomes the ultimate taxpayer to the State, a situation directly in conflict with the *rationale* of sovereign immunity.

In passing, reference should be made to the "boiler plate" provision in the lease that the "Lessor shall pay all taxes." Such a provision heretofore has received judicial construction and has been held to refer only to legally assessed taxes, not to constitute a covenant to pay whatever may be demanded under the guise of taxes. (See: *Scott* v. *Society, etc.*, 59 Neb. 571, 81 N.W. 624; *United States* v. *Allegheny County*, 322 U.S. 174.)

Therefore, it would appear that it was the intent of Congress, in adopting the revised Enabling Act wording, that all property "reserved" for Federal governmental *use* should be exempt from the impact of the State taxing power so as to insure against interference with the Federal use, that the sort of property tax here involved is the very type of State interference intended by Congress to be forbidden, and that the construction placed by the Oklahoma Supreme Court upon the provision is both unrealistic and incorrect.

2. The enactment exempting property not already immune from State taxation is within the constitutional prerogatives of the Congress.

Since the reservation of this property for Federal use is for postal purposes, a constitutionally authorized function of the Federal Government (Article I, Section 8, Clause 7, Constitution of the United States), it is unnecessary to explore the penumbra of Federal uses for which property may be reserved and still be protected by the statutory exemption.

It is apparently now well settled that Congress has the right to remove from the scope of the State taxing power subjects of taxation where the State's power potentially could interfere with legitimate Federal governmental functions. *United States* v. *Allegheny County, supra,* 322 U.S. 174; *Federal Land Bank* v. *Bismarck Lumber Co., supra,* 314 U.S. 95; *Pittman* v. *Home Owners' Loan Corp., supra,* 308 U.S. 21; *Board of County Commissioners* v. *Seber,* 318 U.S. 705, 130 F.2d 663.

Even in the dissenting opinion of MR. JUSTICE FRANKFURTER, in the *Allegheny County* case, *supra,* his disagreement with the majority of the Court was predicated upon a difference in conception of the *subject* of the tax there under consideration; the principle above enunciated was not questioned but was expressly conceded.

In view of the firm establishment of that principle it is unnecessary to advance the "compact" theory arising from the coordinated provisions of the Enabling Act and of the Oklahoma Constitution, or to seek to distinguish the decision in *Coyle* v. *Smith,* 221 U.S. 559. Even that decision

concedes the Congressional power in all fields of Federal operation, independent of any concurrence by the State.

3. The exemption of the property from taxation by Federal statute operated to confer a right and privilege upon the petitioners as an incident of their ownership and the State Courts were obliged to give effect to that exemption.

As heretofore shown, the exemption of the Federal statute is directed to the property, not to the owner. The exemption operates only where the property is the subject of the tax, and in such case the ownership becomes immaterial. Also, as heretofore stated, the Oklahoma real property tax operates solely *in rem;* it may not be enforced against the owner. (*Allen* v. *Henshaw, supra.*)

The owner, however, is entitled to claim and receive the benefit of the exemption of his property from subjection to an unlawful lien as an incident of his ownership of the property. (See: *Choate* v. *Trapp,* 224 U.S. 665; *Ward* v. *Board of County Comm'rs of Love County, supra,* 253 U.S. 17; *Carpenter* v. *Shaw,* 280 U.S. 363.) Such is inherent in the holding of the latter two decisions that a denial of the exemption violates United States Constitution, Amendment XIV.

It must be noted that the foregoing is distinctly different from where property is sought to be exempt from taxation on the ground that the *owner* is a Federal instrumentality. In such cases, there must be a clear interference with the owner's governmental functions before his property may be exempt. But, where the *property itself*

is the subject of the exemption, independent of the status of the owner, the right to be free of the unlawful charge upon his property cannot be divorced from his ownership. (*Washburn College* v. *Shawnee County*, 8 Kan. 344, *per* BREWER, J.)

And, when the right of the exemption has its inception in a Federal statute, authorized by the Constitution of the United States, a failure or refusal of a State court to give effect thereto is a direct violation of Article VI, Clause 2, of the Constitution of the United States. (*Testa* v. *Katt*, 330 U.S. 386; *Ward* v. *Board of County Comm'rs, supra.*)

CONCLUSION

Petitioners urge the granting of the writ in this case not alone upon the basis of their own Federal right that has been denied by the Oklahoma Supreme Court. In addition to their own substantial pecuniary interest in securing vindication of a Federal right, a review by this Court is demanded by the very public nature of the questions involved. Similar Federal enactments having been applied to all States admitted to the Union subsequent to 1888 (except Alaska) taxation in all of those States necessarily is affected by the questions here presented. Whenever a Federal right has such widespread effect and application, uniformity of application and enforcement requires that the nature and extent of the right be defined by this Court, not to emphasize further the inescapable financial effect of such a definition upon the cost of performance of the

functions of the Federal Government where, by reason of fiscal demands, it is being obliged to resort to the leasing of facilities which normally it would purchase or construct.

We have no information on the reason why the questions here presented have not been adjudicated previously. In all probability, however, it is because the other States which agreed to the exemption as an incident of their Statehood are keeping their agreements. Otherwise, some other property owner surely would have litigated the matter.

Since the Oklahoma Supreme Court now has publicly denied the exemption, other States may be induced to try a similar avoidance of their agreements, in simulation of modern international practice. Even at this writing, Oklahoma tax officials, encouraged by the attitude of the Oklahoma Supreme Court in this case, are seeking to invade the Federal enclave of Tinker Air Force Base in quest of more taxes, notwithstanding substantial appropriations by the Congress for contributions to local governmental units.

It obviously is governmentally important that the plenary authority of the Congress, in relation to the interference by the State taxing power with the functioning of the Federal Government, be reasserted, leaving to the already-demonstrated liberality of the Congress the amount of contributions to be made to local government rather than to countenance the opening of the Pandora's Box of conflict of sovereignty resulting from a nullification of the provisions of the Oklahoma Enabling Act and similar statutes.

It is, therefore, urged that the Writ of Certiorari be granted.

Respectfully submitted,

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January, 1959.

APPENDIX

FILED
IN SUPREME COURT
OF OKLAHOMA
SEP 16 1968
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

MAURICE B. BALDWIN and)
LA RISSA M. BALDWIN,)
Plaintiffs in Error,)
vs.) No. 37759
THE BOARD OF TAX-ROLL CORRECTIONS)
OF OKLAHOMA COUNTY, ET AL.,)
Defendants in Error.)

SYLLABUS

1. The Board of Tax-roll Corrections has jurisdiction to determine if part of a taxable unit is exempt from ad valorem taxation.

2. In determining whether part of a taxable unit is exempt from ad valorem taxation, the Board of Tax-roll Corrections exercises a judicial function; therefore its orders granting or denying the claimed exemption are subject to review by the district court by virtue of 12 O. S. 1951, § 951.

3. The provision contained in the third sub-division of Sec. 3 of the Enabling Act and in Art. I, Sec. 3, of the Oklahoma Constitution that the state shall impose no taxes "on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use" does not exempt from ad valorem taxation property leased to the Federal Government.

[APPENDIX]

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA

HON. CLARENCE M. MILLS, JUDGE

Proceedings before the Board of Tax-roll Corrections to have certain real property and improvements declared exempt from taxation. From a judgment of the District Court of Oklahoma County affirming the Board's order denying the claimed exemption, applicants appeal.

AFFIRMED

Luther Bohanon,
Bert Barefoot, Jr.
Oklahoma City, Oklahoma,

Leon S. Hirsh
Oklahoma City, Oklahoma, For Plaintiffs in Error,

James W. Bill Berry,
County Attorney,
Oklahoma County, Oklahoma;

M. M. Thomas
Assistant County Attorney
Oklahoma County, Oklahoma, For Defendants in Error.

JACKSON, J.:

Applicants, Maurice B. Baldwin and La Rissa M. Baldwin, filed an application before the Board of Tax-roll Corrections of Oklahoma County to have certain real property and improvements owned by them declared exempt from taxation.

The claim of exemption is based upon the fact that part of said property is under lease to the Federal Government for postal purposes. The Board denied the application; whereupon applicants apealed to the District Court.

The District Court affirmed the order of the Board and applicants appeal.

At the outset we must determine whether this court has jurisdiction to determine the merits of the controversy. The County Attorney contends that we do not.

If the Board of Tax-roll Corrections did not have jurisdiction to determine whether such property was exempt from taxation, it follows that neither the District Court nor this Court has appellate jurisdiction to make such determination. *Clark* v. *Gray*, 204 Okl. 221, 228 P. 2d 654.

68 O. S. 1951 § 184d creates a Board of Tax-roll Corrections to hear and determine allegations of error, mistake or difference as to items contained in the Tax Rolls. This statute specifically authorizes the Board to determine if "Property exempt from taxation has been assessed;". If such fact appears the Board must grant certain specified relief.

The difficulty in the instant case results from the fact that the property involved in this action was assessed as a unit, and only *part* of the building situated on the property is leased to the Federal Government. Therefore, had the Board allowed the claimed exemption it would have then been necssary for the Board to place a valuation on the exempt portion and deduct such amount from the total valuation. Evaluation is a function normally performed by the Board of Equalization. *Chapman* v. *Draughons School of Business*, Okl. 287 P. 2d 903. In the cited case we held that in cases such as here involved, the property owner could not proceed in the first instance by way of injunction in the District Court. That case also contains dictum to the effect that the sole remedy available where only part of the property is claimed as exempt, is by proceedings before the Board of Equalization. However, it was not contended in that case that the property owner could seek such relief before the Board of Tax-roll Corrections. The

sole issue there involved was whether injunctive relief was available where only part of the unit was claimed to be exempt. 68 O. S. 1951 § 15.49, provides:

> "The proceedings before the Boards of Equalization and appeals therefrom, shall be the sole method by which assessments or equalizations shall be corrected or taxes abated. Equitable remedies shall be resorted to only where the aggrieved party has no taxable property within the tax district of which complaint is made."

Subsequent to the enactment of this statute the legislature enacted 68 O. S. 1951 § 184d creating the Board of Tax-roll Corrections, specifically authorizing such Board to correct assessments and abate taxes in certain instances, and further specifically authorized the Board to grant relief when exempt property has been assessed.

Prior to the enactment of the latter statute, this court had held that where a taxable unit was not physically separable the value of the exempt portion should be deducted from the value of the property as a whole. *Oklahoma County* v. *Queen City Lodge No. 197, I.O.O.F.*, 195 Okl. 131, 156 P. 2d 340. It must have therefore been within the contemplation of the legislature in enacting Section 184d, that in such cases the Board of Tax-roll Corrections would necessarily have to evaluate the exempt portion in order to effectuate the purposes of the statute. If, in a given case, the taxpayer could not go before the Board of Tax-roll Corrections, and had not received notice of the fact that the exempt property had been assessed until after the Board of Equalization had adjourned, his only recourse would be to pay the taxes under protest and sue to recover same. In our opinion one of the purposes for the creation of the Board of Tax-roll Corrections was to obviate the necessity for such involved and expensive procedure. We hold that the Board of Tax-roll Corrections had jurisdic-

tion to determine if a portion of the property was exempt from taxation.

Section 184(d) does not provide for an appeal from the orders of said Board. But it is manifest that in determining whether certain property is exempt from taxation the Board would be exercising a judicial function as opposed to a ministerial function. Therefore, the District Court had jurisdiction to review the orders of the Board by virtue of the express provisions of 12 O. S. 1951 § 951.

Is that portion of the applicants' real property *leased* by the Federal Government for postal purposes exempt from taxation?

The lease is for a period of fifteen years, and provides for an annual rental of $18,363.00. It also contains a provision that "the lessor shall pay all taxes."

The claimed exemption is predicated upon a certain provision contained in the third sub-division of Sec. 3 of the Enabling Act, and repeated verbatim in Art. I, Sec. 3, of the Oklahoma Constitution. Such provision is as follows:

> "No taxes shall be imposed by the state on lands or property belonging to or which may hereafter be purchased by the United States or *reserved for its use*" (Emphasis supplied).

Applicants contend that the emphasized words exempt their property from taxation because it is being *used* by the Federal Government. In their brief applicants specifically call our attention to the fact that they do not claim the property exempt or immune from taxation under the provisions of Art. 10, Sec. 6, of the Oklahoma Constitution. They further admit that this property is not inherently immune from taxation merely because it is being *used* by the Federal Government. In this connection, however, it appears that much of the argument in applicants' reply

brief goes to the question of inherent immunity. The tax cannot be declared invalid on any theory of immunity. *M'Culloch* v. *Maryland*, 4 Wheat (US) 316, 4 L. ed 579. See also 51 Am. Jur., Taxation § 236. Applicants can prevail, if at all, only by reason of the language contained in the Oklahoma Constitution and the Enabling Act, exempting from taxation that property "reserved for its use."

Had it been provided that property *used* by the United States would not be taxable, plaintiffs' theory would probably be correct. But this exemption clause applies only to property *reserved for the use* of the United States. In *Gerlach Livestock Corporation* v. *United States*, 76 F. Supp. 87, p. 93, the court said:

> "The condition of the deed reads, the grantor 'reserves' the right. This word means to keep or retain; that is to say, to keep what one already has. You do not reserve a right which you do not possess."

In *United States* v. *Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195, the court in discussing the word "reservation", said:

> "The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide."

That portion of Sec. 3 of the Enabling Act preceding the provision in question provides that the people of Oklahoma disclaim all right and title to any unappropriated public lands "and that until the title to any such public land shall have been extinguished by the United States the same shall be and remain subject to the jurisdiction, disposal and control of the United States." It is conceivable that this unappropriated public land over which the United

States retained control was the land referred to as being "reserved for its use." It is true that this reservation of unappropriated public land reserved more than a mere right of *use*, and in fact constituted a reservation of title to such lands, but it is again possible that the words "for its use" were intended as merely explanatory of the purposes for which the reservation was made. However, applicants argue that since the government *owned* reserved land, it would be exempt from taxation under the first part of the hereinabove quoted clause which specifically exempts property *owned* by the United States, and that therefore the last part of the clause exempting property "reserved for its use" must have been intended to cover other situations. There is some merit in this argument, and it is possible that such language might have been intended to exempt property thereafter disposed of, but with express reservations of the right to use the same for certain purposes and for certain periods of time. However, we do not deem it necessary to make an unequivocal determination of the exact type and character of the property to which such words refer. We need only decide, and do so decide, that this language is not susceptible to the interpretation which applicants seek to give it. It is certain that the property involved in this action has not been *reserved* by the Federal Government. It has merely been leased.

In re Noble's Estate, 183 Okl. 148, 80 P.2d 243, it is held in the first paragraph of the syllabus:

> "A tax exemption claim cannot be sustained unless it is shown that it comes clearly within the provisions of the law under which the exemption is claimed."

And in *Wenner, Co. Treas.* v. *Mothershead*, 129 Okl. 273, 264 P. 816, it is held in the third paragraph of the syllabus:

[APPENDIX]

"Under the recognized rule of law, property is never exempted from taxation except by a special and definite provision of law."

Had it been the intent of Congress or the framers of our Constitution to exempt property from taxation by reason of mere *use* by the Federal Government, it would have been extremely simple to have so provided.

Affirmed.

LIBRARY
SUPREME COURT, U. S.

FILED
FEB 14 1959
JAMES R. BROWNING, Clerk

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 658

MAURICE B. BALDWIN and LARISSA M. BALDWIN,
Petitioners,

VERSUS

THE BOARD OF TAX-ROLL CORRECTIONS OF OKLAHOMA COUNTY and W. T. BILL HALE, County Treasurer of Oklahoma County,
Respondents.

Certiorari to the Supreme Court of Oklahoma

BRIEF OF RESPONDENTS IN OPPOSITION

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February, 1959.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8750

SUBJECT INDEX

	PAGE
Jurisdiction	1
Statement	2
Argument	2
The Decision Below Was Correct	7
Petitioners' Claim of Exemption Is Frivolous	8
Conclusion	9

AUTHORITIES

CASES:

Choctaw O.N.G. Railway Co. v. Mackay, 256 U.S. 531, 41 Sup. Ct. 582, 65 L. Ed. 1076	7
Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17, 54 Sup. Ct. 267, 78 L. Ed. 622	7
Gerlach Livestock Corp. v. United States, 76 F. Supp. 87, 93	7
Heiner v. The Colonial Trust Company, 275 U.S. 232, 72 L. Ed. 256	6
Ken Realty Company, Inc. v. Johnson, Treasurer, 138 F.2d 809	3
Myers v. Conway, 7 So. 639 (Ala.)	7
New Brunswick v. United States, 276 U.S. 555, 72 L. Ed. 693	5
Parker v. McClain, 237 U.S. 269, 59 L. Ed. 1051, 35 Sup. Ct. 632	9

INDEX CONTINUED

PAGE

Spohn v. Stark, 150 N.E. 787 (Ind) 7

S.R.A., Inc. v. State of Minnesota, 327 U.S. 558, 90 L. Ed. 851 5

State of Alabama v. King and Boozer, 314 U.S. 1, 86 L. Ed. 3, 62 Sup. Ct. 43 6

Taber v. Indian Territory Illuminating Oil Company, 300 U.S. 1, 81 L. Ed. 463 ..... 4, 5

United States v. Celestine, 215 U.S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195, 197 7

STATUTES:

Oklahoma Enabling Act, Act of Congress, June 16, 1906, Section 3, Chapter 3335 (34 Stat. 269) 2, 3, 8

Title 28, U.S.C.A., Sec. 1257(3) 1, 2

MISCELLANEOUS:

Oklahoma Constitution, Article 1, Section 3 ..... 2, 3

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Respondents.

Certiorari to the Supreme Court of Oklahoma

BRIEF OF RESPONDENTS IN OPPOSITION

JURISDICTION

Respondents say that the petition for certiorari filed herein fails to show that this Honorable Court has jurisdiction to grant the relief prayed. The requirements of Title 28, U.S.C.A., Sec. 1257(3), to give this Honorable Court jurisdiction in certiorari are not met. No substantial Federal question is presented.

STATEMENT

Section 3 of the Oklahoma Enabling Act, Act of Congress, June 16, 1906, Chapter 3335 (34 Stat. 269) is correctly quoted on page 6 of the petition for certiorari and it is true, as stated, that the Oklahoma Constitution, Article 1, Section 3, is a copy verbatim of said Section 3 except that the word "proposed" preceding the word "state" is dropped. The petitioners are owners, in fee simple, of the involved land in Oklahoma County with a building thereon. It had been regularly subject to taxation. On March 16, 1953, petitioners entered into a written lease of the building alone with the United States Postmaster General for a term of 15 years at an annual rental of $18,362.00. The building was to be used by the Government for postal purposes. The lease specifically provided that "the lessor shall pay all taxes and water rates * * *."

The taxation authorities of Oklahoma County assessed the property for ad valorem taxes in the names of the owners. The tax was non-discriminatory. It is not contended that it was other than an equal assessment compared with other similar property in Oklahoma County.

There has been no tax levied upon the leasehold or any other interest of the Government in the involved property.

ARGUMENT

Petitioners state that statutory jurisdiction and grounds for review are conferred by 28 U.S.C.A., Sec. 1257(3).

Petitioners allege a right or privilege of exemption claimed under a statute of the United States, the Okla-

homa Enabling Act. On its face, therefore, the petition would seem to be sufficient to sustain a grant of certiorari.

But immediately, petitioners cite and place sole reliance upon the Act of Congress, the Oklahoma Enabling Act, Section 3, which does not grant an exemption to the petitioners. The only exemption from taxation granted therein is to the United States and the United States is not claiming an exemption. It is not a party here.

The exemption granted is to the United States only. It is not transferable. It is not to be used for the special protection or profit of a private citizen.

In *Ken Realty Company, Inc.* v. *Johnson, Treasurer*, 138 F.2d 809, the United States Government sold an abandoned Post Office building and grounds to plaintiff, the consideration being payable in 10 equal installments. The purchaser took possession and the agreement provided that purchaser might sell parts of the property and leases might be made without Government approval. The Government retained title to the property and a deed was to be given when the purchase price was paid. Plaintiff claimed the property was exempt.

> *Held*: "Mutual immunity from taxation accorded to State and Federal Governments under Federal Constitution must be given a practical application so as to attain its purpose, but without unnecessary interference with the right of taxation, and it is personal to the Government and is not transferable to, or to be used for special protection of a citizen."

Under this rule of law, neither the Oklahoma Enabling Act nor Article 1, Section 3, of the Oklahoma Constitution,

relied upon by the petitioners, has any application in the instant case, and jurisdiction fails for want of a Federal question.

The difficulty of petitioners' petition is that they are claiming the benefits of an exemption, as private citizens, when the private citizen is not given an exemption under the Act of Congress.

It is claimed that the property is exempt because it is being used by the Government. But "use" alone is not the test of the terminal clause of the Act. There must be a "reservation" by the Government for its (the Government's) use. This involved property has not been reserved by the Government. Its right of use was acquired under the lease.

Mere use by the Government or even its agencies will not free the property from taxation. In *Taber* v. *Indian Territory Illuminating Oil Company*, 300 U.S. 1, 81 L. Ed. 463, it was contended that certain property used by the lessee of the Indian land in the development of oil on the Indian lands was exempt. But this Honorable Court held that exemption did not lie and reversed the case. It was held that a non-discriminating tax upon property of an agent of the Government imposed no direct burden on the exertion of governmental powers.[1]

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[1] "If the federal government owned the agency and controlled the agent and owned the property to be used in executing the agency, we would have a state of facts applicable to the proposition stated by the plaintiff, but the facts of the case we are considering are similar to a national bank as a federal agency. The charter and specie are not subject to be taxed under state law, but the building and ground owned by the bank and used in operating its business are not a part of the agency exempt from taxation. The same is true as to the post office agency,

Since the adoption of the Oklahoma Constitution in 1907, and the acceptance of the Act of Congress, many cases have arisen illustrative of what is meant by "reserved for its use."

In *New Brunswick* v. *United States*, 276 U.S. 555, 72 L. Ed. 693, the United States in 1918 purchased lands in New Jersey for the purpose of providing housing for its employees. Thereafter, in winding up the affairs of the Housing Corporation, the Government sold the lands under contract wherein the United States retained the legal title to the property as security for the payment of balances due on the purchase price. New Brunswick assessed the properties for taxes after such contract for sale but before delivery of deeds. The validity of such taxes was the question presented.

This Court upheld the taxation authorities so long as the interests of the Government were protected. The reservation of title as security presents a clear instance of what is meant by "reserved for its use."

Another such case is *S.R.A., Inc.* v. *State of Minnesota*, 327 U.S. 558, 90 L. Ed. 851.[2]

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[1] (Continued)
where the government furnishes the agent and private persons furnish the house and grounds where the agency functions. The house and grounds would not be a part of the agency exempt from taxation. The source of the agency being in the federal government does not force the conclusion that the means by which the agency is exercised is a part of the same, and, therefore, not subject to state authority for taxation." *Taber* v. *Indian Territory Illuminating Oil Co., supra.*

[2] "An executory contract for the sale of lands by the United States to a private purchaser under which the purchaser is given possession and is to receive the legal title upon payment of the purchase price operates to subject the lands to the tax laws of the State." *S.R.A., Inc.* v. *Minnesota, supra.*

Petitioners' third proposition is without merit. Therein they assert that the owner of lands is entitled to receive the benefit of an exemption of his property as "an incident of his ownership of the property."

That question was not even presented to the Supreme Court of Oklahoma and that Court made no decision thereon. It presents no federal question.

The cases cited by petitioners' third proposition are inapplicable. All three deal with Indians who received allotments under Indian treaties and Acts of Congress and their exemptions were upheld by the Supreme Court of Oklahoma. Petitioners are white people who entered into a commercial lease of their property to the Government for profit.

The petitioner urges that if the tax be upheld the United States will be the ultimate taxpayer since the owner will endeavor to fix the rental in an amount sufficient to pay the taxes in addition to a fair consideration for the lease. This contention is answered in *State of Alabama* v. *King and Boozer*, 314 U.S. 1, 86 L. Ed. 3, 62 Sup. Ct. 43, where this Court held that the Constitution, unaided by congressional legislation does not prohibit non-discriminatory state taxation merely because the burden is passed on economically as a part of the cost.

To the same effect is *Heiner* v. *The Colonial Trust Company*, 275 U.S. 232, 72 L. Ed. 256, where the Court said that tax exemptions are never lightly to be inferred and any implication of an exemption of the income of Indians, if made, must rest on too narrow a basis to justify the in-

clusion of income to other persons, merely because the statute if applied, as written, may have some perceptible economic effect on the Indians.

THE DECISION BELOW WAS CORRECT

The involved property has not been "reserved" by the Government for its "use."

Permission to use as a post office has been obtained under a commercial lease, for profit, to the owner.

You "reserve" from that which you have. You do not "reserve" by acquisition from that which another person has. You acquire or obtain or purchase from such person; you do not "reserve."[3]

The mere fact that property is used by the United States as an instrument for effecting its purpose[4] does not relieve such property from state taxation, at least where the local tax presents no obstacle to the execution of the national policy.[5]

Of all the cases cited by the parties in the Supreme Court of Oklahoma, the case most nearly in point factually was *Spohn* v. *Stark*, 150 N.E. 787 (Ind.). The factual setup in the *Spohn* case bears great similarity to the instant case, the chief distinction being as to the identity of the sovereign

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[3] *Myers* v. *Conway*, 7 So. 639 (Ala.); *Gerlach Livestock Corp.* v. *United States*, 76 F. Supp. 87 at page 93; *United States* v. *Celestine*, 215 U.S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195 at page 197.

[4] *Choctaw O.N.G. Railway Co.* v. *Mackay*, 256 U.S. 531, 41 Sup. Ct. 582, 65 L. Ed. 1076.

[5] *Federal Compress & Warehouse Co.* v. *McLean*, 291 U.S. 17, 54 Sup. Ct. 267, 78 L. Ed. 622.

lessee; state in one, Federal in the other. Statutory and constitutional provisions of Indiana and Oklahoma were similar. It was held that lessor's property, leased for a profit to the state, to be used exclusively for governmental purposes, was not exempt merely because the lessee devoted the property to purposes or use which would be exempt under the constitutional provisions if so used by the owner. Held that to allow an exemption here would be an "exemption for private gain and a perversion of the enlightened purposes had in view by the framers of the Constitution."

The Oklahoma Supreme Court decided that the phrase "reserved for its use" was not susceptible to the interpretation sought by the petitioners. Under Section 3 of the Enabling Act, we see that no exemption is given to the petitioners as owners. Exemptions are not lightly to be inferred. The Oklahoma Supreme Court was right when it held that the petitioners' property was not exempt.

PETITIONERS' CLAIM OF EXEMPTION IS FRIVOLOUS

It appears from the face of petition for certiorari that Petitioner Baldwin is claiming exemption from a nondiscriminatory tax on his own property because under the Federal Statute, the United States is granted an exemption on its property, and that the United States is using the property of the petitioner under a lease.

No exemption is granted the petitioner under the Federal or state statutes. No Federal question is presented. The United States claims no exemption.

A Federal question which rests upon an obviously false assumption is so plainly devoid of merit as to afford no basis for the exercise by this Court of its appellate jurisdiction over a state court. *Parker* v. *McClain*, 237 U.S. 269, 59 L. Ed. 1051, 35 Sup. Ct. 632.

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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February, 1959.

SUBJECT INDEX

	PAGE
Question Presented for Review	1
Statement	2
Argument	2
Petitioners' Proposition I: The meaning of the provision "Reserved for Its Use"	4
The Exemption Is Personal to the Government	14
Impact On Tax Structure	16
Petitioners' Proposition II: The Enactment exempting property not immune from State taxation is within the constitutional prerogatives of Congress	18
Petitioners' Proposition III: The exemption of the property from taxation by Federal statute operated to confer a right and privilege upon the petitioners as an incident of their ownership and the State courts were obliged to give effect to that exemption	18
Conclusion	20

AUTHORITIES CITED

CASES:

Assessment of Ernest Price, In re, 88 Okla. 156, 212 Pac. 424	3
Baltimore Shipbuilding and Dry Dock Co. v. City of Baltimore, 195 U.S. 375, 25 Sup. Ct. 50, 49 L. Ed. 242	15, 17
Board of County Commissioners v. Central Baptist Church, 136 Okla. 99, 276 Pac. 726, 63 A.L.R. 1327 (Okla.)	3
Boss v. Polk County, 19 N.W.2d 225 (Ia.)	11, 15

INDEX CONTINUED

	PAGE
Carpenter v. Shaw, 280 U.S. 363, 74 L. Ed. 478	19
Carteret Academy v. State Board of Taxes and Assessments, 133 Atl. 886	12
Chicago Theological Seminary v. Illinois, 188 U.S. 662, 23 Sup. Ct. 386, 47 L. Ed. 641	4, 17
Choate v. Trapp, 224 U.S. 665, 56 L. Ed. 941	19
City of Bristow ex rel. Hedges v. Groom, 194 Okla. 384, 151 P.2d 936	3
Commissioners of Cambria Park v. Board of County Commissioners, 174 P.2d 402 (Wyo.)	3
Connecticut Junior Republic Ass'n v. Town of Litchfield, Conn., 174 Atl. 304 (Conn.)	11
Gerlach Livestock Corporation v. United States, 76 F. Supp. 87, 93	6
Heiner v. The Colonial Trust Company, 275 U.S. 232, 72 L. Ed. 256	16, 20
Ken Realty Company, Inc. v. Johnson, Treasurer, 138 F.2d 809	14
Myers v. Conway, 7 So. 639 (Ala.)	6
New York ex rel v. Cook, 148 U.S. 397, 13 Sup. Ct. 645, 37 L. Ed. 498	20
Nobles Estate, In re, 183 Okla. 48, 80 P.2d 243	3
Norwegian Lutheran Church of America v. Wooster, 30 P.2d 381, 384 (Wash.)	10
People ex rel, Rorke v. Board of Assessors of the City of Brooklyn, 32 Hun. 457	9
Princeton Country Day School v. City Board of Tax Appeals, 175 Atl. 136 (N.J.)	12
Rutgers Chapter Delta Upsilon Fraternity v. City of New Brunswick, 28 A.2d 759 (N.J.)	11-12

INDEX CONTINUED

	PAGE
South Dakota, Sigma Chapter House Ass'n v. Clay County, 276 N.W. 258	10-11
Spohn v. Stark, County Treasurer, 150 N.E. 787 (Ind.)	9
State ex rel Hammer v. MacGurn, 86 S.W. 138 (Mo.)	12-13
State of Alabama v. King and Boozer, 314 U.S. 1, 86 L. Ed. 3, 62 Sup. Ct. 43	15
State v. Board of Foreign Missions of Augustana Synod, 22 N.W.2d 642 (Minn.)	11
United States v. Baumgartner, 259 Fed. 722	8
United States v. Celestine, 215 U.S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195	6
United States v. Stewart, 318 U.S. 60, 61 Sup. Ct. 102, 85 L. Ed. 40	20
Ward v. Board of County Commissioners, 253 U.S. 17, 64 L. Ed. 751, 40 Sup. Ct. 419	19
Wenner, County Treasurer v. Mothersead, State Bank Commissioner, 264 Pac. 816	3
STATUTES:	
Oklahoma Enabling Act, Act of Congress, June 16, 1906, Ch. 3335 (34 Stat. 269) Sec. 3	1
Title 68, O.S. 1951, Sec. 15.2	3-4
MISCELLANEOUS:	
Oklahoma Constitution, Art. 1, Sec. 3	2

In the
Supreme Court of the United States

OCTOBER TERM, 1958

No. 658

MAURICE B. BALDWIN and LARISSA M. BALDWIN,
Petitioners,

VERSUS

THE BOARD OF TAX-ROLL CORRECTIONS OF OKLAHOMA COUNTY and W. T. BILL HALE, County Treasurer of Oklahoma County,
Respondents.

Certiorari to the Supreme Court of Oklahoma

RESPONDENTS' BRIEF IN ANSWER TO PETITIONERS' BRIEF

QUESTION PRESENTED FOR REVIEW

Has the Congress in adopting the Oklahoma Enabling Act, Act of Congress, June 16, 1906, Ch. 3335 (34 Stat. 269) Section 3, granted an exemption from taxation by the State of property belonging to individual white citizens, who had leased said property to the Government for profit? The Government agreed to use said property as a Post Office.

STATEMENT

The United States Government is not a party to this lawsuit and asserts no interest in issues presented. The government, recognizing that this involved property might be subject to taxation, protected its rights by inserting in the lease with petitioners the provision "The lessor shall pay all taxes and water rates, and shall have this lease duly recorded * * *."

The Government leased a part of the building only and not the real estate. The involved tax assessed is an ad valorem tax, on the building and real estate.

The tax is a non-discriminatory tax and there is no contention here that the property was assessed at any higher rate than that assessed against other similar properties in Oklahoma City. The consideration of the lease paid to the land owners is substantial, $18,362.00 per annum. The petitioners own and operate the involved property for profit.

ARGUMENT

Unless otherwise noted, all emphasis appearing in this brief is supplied by respondents.

As stated on page 6 of petitioners' brief, Art. 1, Sec. 3 of the Oklahoma Constitution is a copy verbatim of the Oklahoma Enabling Act, Act of Congress, June 16, 1906, Chap. 3335 (34 Stat. 269) Sec. 3, with the exception of one word.

Preliminary to our answer to petitioners' interpretation of "reserved for its use", we deem it helpful to con-

sider certain well established rules of construction of statutory or constitutional provisions having to do with exemption of property from taxation. These were presented to the Oklahoma Supreme Court in our brief.

A constitutional or statutory exemption from taxation must be clearly conferred, in plain words and should be strictly construed against the one claiming exemption.[1]

Taxation is favored in the law; exemptions are not. And claims for tax exemptions are sustainable only when clearly within provisions of the law under which exemption is claimed.[2]

The courts will not read into a section of the Constitution something which is not there. The courts will not legislate by judicial construction.[3]

It is the general theory of the law that all property shall contribute equally to the support of the Government, and that all property, either real or personal, except such as is declared by law to be exempt, shall be subject to ad valorem taxation.[4]

The intent of the Legislature is expressed in the statute declaring what property shall be exempt, Title 68, O.S.

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[1] *Commissioners of Gambria Park* v. *Board of County Commissioners*, 174 P.2d 402 (Wyo.); *Board of County Commissioners* v. *Central Baptist Church*, 136 Okla. 99, 276 Pac. 726, 63 A.L.R. 1327 (Okla.); *Wenner, County Treasurer* v. *Mothersead, State Bank Commissioner*, 264 Pac. 816.

[2] *Commissioners of Cambria Park* v. *Board of County Commissioners, supra; In re Nobles Estate*, 183 Okla. 48, 80 P.2d 243.

[3] *City of Bristow ex rel. Hedges* v. *Groom*, 194 Okla. 384, 151 P.2d 936.

[4] *In re Assessment of Ernest Price*, 88 Okla. 156, 212 Pac. 424.

1951, Sec. 15.2. It provides that all property of the United States and of this State, and all property devoted exclusively to educational, fraternal, religious and benevolent purposes shall be exempt and

> "all property used exclusively and directly for charitable purposes within this state, providing the charity using said property *does not pay rent or remuneration to the owner thereof.*" Title 68, O.S. 1951, Sec. 15.2 (9).

If a decision is close or doubtful as to its correctness, such doubt should be cast for the State or the County, and the burden of establishing his right to exemption should be left on the one asserting such exemption.[5]

I.

The meaning of the provision "Reserved for Its Use."

In their petition, at page 11, the petitioners say:

> "If the words, 'reserved for its use', do not denote a Congressional intent to forbid the State to tax property not Federally owned but merely *effectively subjected to Federal governmental use* to the exclusion of the owner, then Petitioners' claim must fail."

"Effectively subjected" in this case means "leased to" the Government for its use. With this more accurate amendment, we can accept the petitioners' statement.

The meaning of "reserved for its use" in Section 3 of the Act of Congress does not avail petitioners the relief sought.

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5 "Exemption cannot exist by implication only; a doubt is fatal to the claim." *Chicago Theological Seminary* v. *Illinois*, 188 U.S. 662, 23 Sup. Ct. 386, 47 L. Ed. 641.

The principal difficulty confronting the petitioners in this case is that the United States is making no claim of exemption, for its use or otherwise. The United States is asserting no claim at all. The United States is not a party to the action. All of its interests were protected when it provided in the lease that "the lessor shall pay all taxes and water rates, and shall have this lease recorded" (R. 23).

Here the claim of exemption from taxation is not asserted for the benefit of the United States. The claim of exemption is asserted solely to enhance the profits of petitioners in collecting income from their property.

Petitioners must stand or fall on the claim that Section 3 of the Enabling Act and the same section adopted into the Oklahoma Constitution, Art. 1, Sec. 3, grant them an exemption. The relevant part of the section reads as follows:

> "The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. * * * No taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use."

It is the last clause of the section, "reserved for its use", upon which plaintiffs rely in their claim of exemption.

You "reserve" from that which you have; you do not "reserve" by acquisition of that which another person has;

you acquire, or obtain, or purchase from such person, you do not "reserve."

"'Reserve' means to keep, to hold, to retain."

—*Myers* v. *Conway*, 7 So. 639 (Ala).

"The condition of the deed reads: 'The grantor reserves the right.' This word means to keep or retain. That is to say, to keep what one already has. You do not reserve a right which you do not possess." *Gerlach Livestock Corporation* v. *United States*, 76 F. Supp. 87 at page 93.

This Honorable Court had occasion to define "reservation" in *United States* v. *Celestine*, 215 U.S. 278; 30 Sup. Ct. 93; 54 L. Ed. 195, wherein it is said:

"The word is used in the land law to describe any body of land, large or small, which Congress has reserved for any purpose. It may be a military reservation, or an Indian reservation, or indeed, one for any purpose, for which Congress has authority to provide."

From the time of the Louisiana Purchase until the Government "extinguished" its title thereto, the title to all land in Oklahoma was vested in the United States. The Government title to various lands was, from time to time, "extinguished" by treaties with Indians and Indian tribes; by land openings and by various conveyances. Title to any unappropriated lands remained in the United States for its use or its trust; for Indian tribes, military reservations, or other governmental uses, and such "reserves" are exempt from taxation under Art. I, Sec. 3 of the Constitution.

Even in the Enabling Act there were "reservations" other than for the Military or for the Indians. Section 7, relating to the granting of Sections 16 and 36 in every township in Oklahoma Territory for school purposes contain reservations for national parks, game preserves, etc., with the reservation of jurisdiction over the same. The only use declared exempt in this section is property "reserved" for the use of the United States and the provision will not be expanded by judicial construction to include property of a citizen thereafter leased to the Government, with title retained by the citizen.

This entire Section 3 of either the Act of Congress or Oklahoma Constitution relates to lands owned by the United States at the time of the adoption of the Constitution, or to such lands as were thereafter purchased by the United States. In the first sentence the people of Oklahoma forever disclaimed all right and title to any unappropriated public lands lying within the boundaries of the State, and to all lands owned or held by Indian tribes, and until the title to any public land is extinguished by the United States, the same remain under the jursidiction, disposal and control of the United States. Then follows the provisions that no taxes shall be imposed by the State on lands or property belonging to, or which may hereafter be purchased by the United States, or "reserved for its use."

Clearly, as to these two latter provisions, exemption can apply only upon condition of ownership by the United States. If the clause "reserved for its use" has a doubtful meaning, such clause must rest upon the theory of owner-

ship with the recited reservation for use. The doctrine of "*nositur a sociis*" means that the meaning of a doubtful word or clause may be ascertained by reference to the meaning of words or clauses associated with it. *United States* v. *Baumgartner*, 259 Fed. 722. All other provisions of Art. I, Sec. 3, and of the Act of Congress, deal with lands owned by the United States or thereafter purchased by the United States. "Unappropriated public lands", lands "owned or held by any Indian tribes or nations", (wards of the Government), public lands until the title hereto had been "extinguished" by the United States, and lands or property "belonging to" or "which may hereafter be purchased" by the United States, all deal with or have reference to lands which were then owned or were thereafter to be purchased by the United States.

It needs no citation of authority to establish that lands subsequently leased to the United States are not lands purchased, and do not become lands "belonging to" or owned by the United States. In this case there has been no attempt to assess for taxation any land or property of the United States.

Again, we say that the only interest that the United States has in the property involved here, is a leasehold, and no attempt is being made to tax such leasehold.

The involved property has two uses, each separate and distinct from the other. The use of the building by the Government is for postal purposes. But the use by the owners is for gain to themselves. They operate the property for their personal profit.

The owner of the land is liable to taxation. If the owner could successfully assert an exception in this case, he would receive the amount of the taxes in addition to the consideration received from the government for the lease. This he cannot do.[6]

The case of *Spohn* v. *Stark, County Treasurer,* 150 N.E. 787 (Ind.) was cited in our brief in the Supreme Court of Oklahoma.

In the *Spohn* case it was held that lessor's property, used for rental purposes is not exempt merely because the lessee devotes the property to a purpose, or use, which would be exempt under the constitutional provision if so used by the owner. To allow an exemption here would be an "exemption for private gain, and a perversion of the enlightened purposes had in view by the powers of the constitution."

The factual setup in the *Spohn* case bears great similarity to the instant case, chief distinction being as to identity of the lessee sovereign, State in one, Federal in the other. Petitioner Baldwin is receiving rent, per annum, of approximately 44 per cent of the assessed valuation. No

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[6] "The owner of land is liable to taxation. If he leases it for a public school it is not a schoolhouse within the meaning of our school laws. The lessees claim no exemption and they use the building as a school. The lessor is liable as owner. The use of it by his lessee did not create an exemption in his favor. The words 'school-house' in the statute had sole reference to those buildings with the site which the district would have been bound to pay a tax upon as owner but for the exemption. The exemption statute was designed to aid education. Under the construction claimed it would not do so. The board of education hire a building and pay the value of its use and occupation. The owner would get from the treasury by exemption the tax in addition to the value of the use of the premises." *People ex rel. Rorke* v. *Board of Assessors of the City of Brooklyn,* 32 Hun. 457.

attempt is being made to tax the leasehold of the Sovereign. Both statutory and constitutional provisions in the laws of Indiana are similar to Oklahoma. The Indiana Court held that the property was not exempt. The reasoning behind this rule is that the property is not used for tax exempt purposes, by the owner but for gain and profit if rent is paid for its use.

In *Norwegian Lutheran Church of America* v. *Wooster*, 30 P.2d. 381 at 384 (Wash.), it was said that the *owners use* was a commercial one.[7]

And in *South Dakota, Sigma Chapter House Ass'n* v. *Clay County*, 276 N.W. 258, held that if exemption be granted the owner rather than the benevolence, the purpose of the law would be defeated.[8]

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7 "Appellants next ask, Does the fact that property belonging to a church is leased to another organization engaged in a religious work and the rental received used to carry on the religious work of the lessor operate to exempt from taxation the property so leased? We think not. When the owner leases property he parts with the possession and the use for a consideration. He owns and holds the property for the purpose of receiving an income therefrom, and his use is therefore purely a commercial one. We see nothing in the statute to the effect that one renting property to another for a consideration may have that property exempted from taxation because of the use to which the lessee puts the property. The property leased is not and cannot be used 'for the religious purpose of such association', which is the lessor."

8 "This brings us to a determination of the effect of the use of the property by an assumed benevolence, the chapter, prior to July, 1929, during which period the right to exemption could arise from the exclusive use of the property for charitable or benevolent purposes. Section 6670, Revised Code of 1919, *supra*. Analysis has convinced us that when this problem is approached from the aspect of 'use of the property', ownership of the property continues as a factor to be considered. An exemption of this type is granted as a concession by government in return for unselfish ministrations to human welfare.

Tax exemptions are founded on public policy. Thus exemptions are not based on the favoring of particular persons or corporations at the expense of the taxpayers generally, or granted on any idea of lessening the burdens of individual property owners. *State* v. *Board of Foreign Missions of Augustana Synod*, 22 N.W.2d 642 (Minn.); *Boss* v. *Polk County*, 19 N.W.2d 225 (Ia.).

It has been stated that exemptions are favored on the theory that the concession is due to *quid pro quo* for the performance of service essential to the public by which the State is relieved *pro tanto* from performing. *Connecticut Junior Republic Ass'n* v. *Town of Lichfield, Conn.*, 174 Atl. 304 (Conn.).

Thus, where the exemption from taxation serves the public, and not a private interest, it cannot be regarded as a gift or donation of public credit, or in aid of the individual in whose favor the exemption is declared. *But without that concurring prerequisite, an exemption becomes essentially a gift of public funds*, and indefensible both under public policy and under the constitutional safeguard against illegal taxation. *Rutgers Chapter Delta Upsilon Fra-*

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8 (Continued)
That this concession is intended by the Legislature as a *quid pro quo* is asserted by authority. *Carteret Academy* v. *State Board of Taxes and Assessment*, 102 N.J.L. 525, 133 A. 886, 887; 61 D.J. 382. If the advantage of the concession so made be permitted to accrue to ownership rather than to the benevolence the law seeks to foster or promote, obviously the purpose of the law will be defeated. Therefore, the landlord may not claim exemption of property leased to an institution of one of the enumerated classes for a rent equivalent. As to such an ownership, the property is used exclusively for rental purposes, and not for charitable or benevolent or educational, etc., purposes." *Sigma Chapter House* v. *Clay*, *supra*.

ternity v. *City of New Brunswick*, 28 A.2d 759 (N.J.); *Princeton Country Day School* v. *City Board of Tax Appeals*, 175 Atl. 136 (N.J.); *Carteret Academy* v. *State Board of Taxes and Assessments*, 133 Atl. 886.

In the case of *State ex rel Hammer* v. *MacGurn*, 86 S.W. 138 (Mo.), it is said:

> "So, if the private owner of the land allows his land to be used for such purposes, and charges no rent, and derives no personal benefit from the land, the land is exempt from taxation, because the land is then devoted exclusively to such a use. This was the case in *City of Louisville* v. *Werne* (Ky.), 80 S.W. 224, relied on by the defendants. For in such cases the owner, contributes the use of his land to public or *quasi* public use, or to such a use as the Constitution contemplates, and derives no gain or profit for himself, and therefore the state does not exact a tax from his land with one hand while accepting a contribution of the use of his land with the other hand. But, on the contrary, when the owner leases his land to the public for a public use, or to a *quasi* public body for a charitable or religious use; and applies the rents derived from the land to his own personal advantage, he contributes nothing to the public or to charity, he loses nothing by the use, he is not a benefactor to any one, but he stands before the law in exactly the same light as any one else who leases his land for any other purpose, and uses the rents for his own advantage, and therefore he is not entitled to any special consideration at the hands of the law or the government, and his property is not exempt. There would be just exactly as much, and no more or less, reason for holding that the property of one who sold provisions or supplies to a charitable institution, which were used to support the lives of the inmates thereof, was exempt from tax-

ation. In both cases he would get and appropriate to his own use the proceeds or products of his property, just the same as if it had been rented, or sold to a private citizen, or to a business concern; and in neither instance would the state or the charitable institution be benefited one jot or tittle by the transaction, for it would pay a full consideration for all it got."

It is conceivable that the clause "reserved for its use", could refer to numerous situations. We concede that under both Art. 1, Sec. 3, Oklahoma Constitution and Sec. 3 of the Enabling Act, there are specific provisions prohibiting the State from taxing lands or property *belonging to* or which may hereafter be purchased by the United States. The Government is constantly purchasing lands and it is also selling lands and renting lands, and is "extinguishing" its title to both unappropriated public lands and lands which it has purchased and it will continue to do so in the future. And in such sales or disposals of its property the Government often will desire to reserve some part or parcel of its lands "for its use", and such "uses" and such "reservations", will depend on conditions confronting it in each individual case.

We believe that this term "reserved for its use", was employed for the protection of the Government in all its future conveyances of public property, following the enactments, if the Government desires to reserve for any use.

The taxation authorities of Oklahoma County do not seek to tax the property of the United States and will not seek to tax property hereafter acquired by the Government in Oklahoma. They do not seek to tax a property

here that has been "reserved" by the Government, for the use of or by the Government.

The Exemption Is Personal to the Government

The petitioners in the instant case seek to invoke an exemption allowed to the Government on its lands or property, for their own personal profit. But any exemption granted to the Government is *personal to the Government* and it is not transferable to or to be used for special protection or profit or gain of a citizen.

In *Ken Realty Company, Inc.* v. *Johnson, Treasurer*, 138 F.2d 809, the United States Government sold an abandoned Post Office building and grounds to plaintiff, the consideration being payable in ten equal installments. The purchaser took possession and the agreement provided that purchaser might sell parts of the property and leases might be made without government approval. The Government retained title to the property and a deed was to be given when the purchase price was paid. Plaintiff claimed the property was exempt and brought an injunction to prevent the assessment. The complaint was dismissed, and plaintiff appealed.

> Held: "Mutual immunity from taxation accorded to State and Federal Governments under Federal Constitution must be given a practical application so as to attain its purpose, but without unnecessary interference with the right of taxation, and *it is personal to the Government and is not transferable to, or to be used for special protection of a citizen.*"

Taxation of the property of plaintiffs in error in no way affects the governmental functions of the United States, and the imposition of an ad valorem tax thereon does not in any way contravene the Federal Constitution. *Boss* v. *Polk County*, 19 N.W. 2d, 225.

The facts in the *Boss* case are very similar to the instant case, the principal distinction being that the property was taken by condemnation limited to duration of war in the *Boss* case, instead of by lease as in the instant case. It was contended that the property was exempt by reason of the "use" by the Government. Held that it was not a tax upon any part of the operation of the Government.

The Court quotes at length from the opinion of the learned JUSTICE HOLMES in *Baltimore Shipbuilding and Dry Dock Co.* v. *City of Baltimore*, 195 U.S. 375, 25 Sup. Ct. 50, 49 L. Ed. 242.[9]

The petitioner urges that if the tax be upheld the United States will be the ultimate taxpayer since the owner will endeavor to fix the rental in an amount sufficient to pay the taxes in addition to a fair consideration for the lease. This contention is answered in *State of Alabama* v. *King and Boozer*, 314 U.S. 1, 86 L. Ed. 3, 62 Sup. Ct. 43, where this Court held that the Constitution, unaided by Congressional Legislation does not prohibit non-discriminatory state taxation merely because the burden is passed on economically as a part of the cost.

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[9] "It would be a very harsh doctrine that would deny the right of the States to tax lands because of a mere possibility that they might lapse to the United States. The contrary is the law. The conditions cannot be extinguished by the State, but the fee is in the Dock Company, and that can be taxed and, if necessary, sold, subject to the condition" (Citing other United States Supreme Court cases).

To the same effect is *Heiner* v. *The Colonial Trust Company*, 275 U.S. 232, 72 L. Ed. 256, where the Court said that tax exemptions are never lightly to be inferred and any implication of an exemption of the income of Indians, if made, must rest on too narrow a basis to justify the inclusion of income to other persons, merely because the Statute if applied, as written, may have some perceptible economic effect on the Indians.

Impact On Tax Structure

At page 2 of the petition for the writ, petitioners say:

> "The particular Federal statute involved relates solely to taxation by the State of Oklahoma; but identical provisions are contained in the Federal enabling statutes applying to the States of North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, New Mexico, and Arizona, whereby the issues here presented are of widespread effect."

We agree that if the issues here presented were decided against the State it would have a widespread effect.

The Government has leased and is continuing to lease vast amounts of property over this nation. The petitioners here contend that even although such leases contain a provision whereby the lessors agree to pay the tax that, nevertheless, the exemption controls. In a great majority of the towns and cities in the State of Oklahoma, the Federal Government rents the building for its use as Post Office. The Government does not see fit to purchase the properties. We cannot estimate the number or value of properties leased for post office purposes in the State

of Oklahoma. If we add to Oklahoma the states of North Dakota, South Dakota, Montana, Washington, Idaho, Wyoming, Utah, New Mexico and Arizona, there will be a vast amount of property privately owned and operated for profit that will be withdrawn from the taxation structure of all said states.

Many additional properties are leased by the Government from private owners for federal governmental use in addition to the Post Offices. If petitioners' contention here can be sustained, the damage to the tax structure of the several states mentioned would be appalling. And all this would be accomplished by virtue of an implied exemption where the general rule employed in the construction of statutory or constitutional provisions is that the exemption from taxation must be clearly conferred, in plain words, and should be strictly construed against the one claiming the exemption. All this would be accomplished in face of this Court's declaration in *Chicago Theological Seminary* v. *State of Illinois*, 188 U.S. 662, 23 Sup. Ct. 386, 47 L. Ed. 641. "Exemption cannot exist by implication only; a doubt is fatal to the claim."

It was JUSTICE HOLMES in *Baltimore Shipbuilding and Dry Dock Company* v. *City of Baltimore*, 195 U.S. 375, 49 L. Ed. 242, who said:

> "* * * But, furthermore, it seems to us extravagant, to say that an independent, private corporation for gain, created by a state, is exempt from state taxation, either in its corporate person or its property, because it is employed by the United States, even if the work for which it is employed is important and takes much of its time."

II.

Petitioners' second proposition reads as follows:

The Enactment exempting property not immune from State taxation is within the constitutional prerogatives of Congress.

We have no quarrel with petitioners' proposition as above stated. The discussion is academic and interesting, but avails the petitioners nothing in this case since Congress has not seen fit to pass an act giving to a private land owner an exemption on his property, which he uses for his profit in leasing the same to the Government. The proposition is predicated on an assumption that the involved property is exempt.

III.

Petitioners third proposition reads:

The exemption of the property from taxation by Federal statute operated to confer a right and privilege upon the petitioners as an incident of their ownership and the State courts were obliged to give effect to that exemption.

We join issue with petitioners' third proposition for the reason that it is respondents' contention that there is no Federal or State statute exempting Baldwin's interest in their property.

The third proposition is without merit. Therein, petitioners assert that the owner of lands is entitled to receive the benefit of an exemption of his property, as "an incident of his ownership of property."

That, however, was not even presented to the Supreme Court of Oklahoma and that court made no decision thereon.

It presents no Federal question. Baldwin cites three cases by this Court, but none of the cases are applicable in consideration of the case at bar.

Choate v. *Trapp*, 224 U.S. 665, 56 L. Ed. 941, involved Indian lands conveyed under the Atoka Treaty and ratified by Acts of Congress. The land of the Indians was to be non-taxable for 25 years. *It was stated in the opinion that there is a broad distinction between tribal property and private property.* From the time that the United States "extinguished" its title to the land in question, to the time that Baldwin (a white man) acquired title and on to the time of the lease to the Government, this land was subject to taxation, and Baldwin had no exemption by treaty or statute.

Ward v. *Board of County Commissioners*, 253 U.S. 17, 64 L. Ed. 751, 40 Sup. Ct. 419; and *Carpenter* v. *Shaw*, 280 U.S. 363, 74 L. Ed. 478, were other cases involving Indian claimants who had received allotments under a Treaty and Acts of Congress. They were wards of the Government and exemption of their lands was upheld.

All three of the cited cases deal with the Indians who received allotments under Indian Treaties and Acts of Congress and their exemptions were upheld by the Supreme Court of Oklahoma.

Petitioners are white people who entered into a commercial lease of their property to the Government for a profit.

Petitioners are attempting to obtain an exemption by implication. The general rule is that exemptions from tax-

ation cannot rest upon implication.[10] And it cannot be lightly inferred from the doubtful import of language of a statute[11] but it must plainly appear either from the express words or necessary intendment of a statute [12] and not left to implication or inference.

We submit that for all of the foregoing reasons, the petition for a writ of certiorari should be denied or, in the alternative, that the decision of the Supreme Court of Oklahoma herein be affirmed.

Respectfully submitted,

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February, 1959.

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[10] *United States* v. *Stewart*, 318 U.S. 60, 61 Sup. Ct. 102, 85 L. Ed. 40.

[11] *Heiner* v. *Colonial Trust Company*, 275 U.S. 232, 48 Sup. Ct. 64, 72 L. Ed. 256.

[12] *New York ex rel.* v. *Cook*, 148 U.S. 397, 13 Sup. Ct. 645, 37 L. Ed. 498.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 658

MAURICE B. BALDWIN and LA RUSSA M. BALDWIN,
Petitioners,

VERSUS

THE BOARD OF TAX-ROLL CORRECTIONS OF OKLAHOMA COUNTY and W. T. BILL HALE, COUNTY TREASURER OF OKLAHOMA COUNTY,
Respondents.

MEMORANDUM IN REPLY TO "RESPONDENTS' BRIEF IN ANSWER TO PETITIONERS' BRIEF"

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February, 1959.

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SUBJECT INDEX

	PAGE
Statement	1
Conclusion	7

INDEX TO AUTHORITIES

CONSTITUTIONAL PROVISIONS:	
Oklahoma Constitution, Article X, Sec. 6	7
RULES OF THE SUPREME COURT OF THE UNITED STATES:	
Rule 23, paragraph 3	2
Rule 24, paragraph 1	1
FEDERAL STATUTES:	
34 Stat. 269, Sec. 3	2
STATE STATUTES:	
68 Okla. Stat. 1951, Sec. 15.3	4
68 Okla. Stat. 1951, Sec. 152	7
COURT DECISIONS:	
Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U.S. 375	4, 5
Board of Commrs. v. Tulsa Business College, 150 Okla. 197, 1 P.2d 351	3
Boss v. Polk County, 236 Iowa 394, 19 N.W.2d 225	5
Carpenter v. Shaw, 280 U.S. 363	5
Choate v. Trapp, 224 U.S. 665	5
Cox v. Dillingham, 199 Okla. 161, 184 P.2d 976	3
Davis v. Taylor, 194 Okla. 565, 153 P.2d 231	4

INDEX CONTINUED

PAGE

Federal Land Bank v. Bismarck Lumber Co., 314 U.S. 95 4

Heiner v. Colonial Trust Co., 275 U.S. 232 5

Ken Realty Company v. Johnson, Treasurer, 138 F.2d 809 5

Pittman v. Home Owners' Loan Corp. 308 U.S. 21 4

Spohn v. Stark, County Treasurer, 197 Ind. 299, 150 N.E. 787 3

United States v. Allegheny County, 322 U.S. 174 4

Ward v. Board of County Commrs. of Love County, 253 U.S. 17 5

No. 658

In the

Supreme Court of the United States

OCTOBER TERM, 1958

MAURICE B. BALDWIN and LA RISSA M. BALDWIN,
Petitioners,

VERSUS

THE BOARD OF TAX-ROLL CORRECTIONS OF OKLAHOMA COUNTY and W. T. BILL HALE, COUNTY TREASURER OF OKLAHOMA COUNTY,
Respondents.

MEMORANDUM IN REPLY TO "RESPONDENTS' BRIEF IN ANSWER TO PETITIONERS' BRIEF"

Due to the highly irregular procedure of counsel for the respondents, it appears necessary to burden the Court with this memorandum, replying to the second brief filed by opposing counsel herein.

It had not been deemed necessary to reply to the brief served upon us on February 13, 1959—a brief permitted under Rule 24, paragraph 1—inasmuch as all matter therein was fully covered by the Petition for Writ of Certiorari.

However, on February 18, 1959, these counsel were served with another brief denominated "Respondents' Brief

in Answer to Petitioners' Brief", although no such latter document had been presented by us (and, if presented, would have been rejected by the Clerk under paragraph 3 of Rule 23). On inquiry made to the Clerk, we were informed that this latter brief of opposing counsel had been accepted for filing, notwithstanding the non-existence of the brief which it purports to answer. And, since this latter dissertation of opposing counsel obviously seeks to induce prejudgment of the issues on their merits—rather than upon the propriety of assumption of jurisdiction—its acceptance for filing compels this memorandum in reply.

In presenting this memorandum, however, petitioners do not presume to present their argument in the comprehensive detail which would be advanced on plenary consideration, merely endeavoring to protect themselves from any adverse impact possibly occasioned not only by the irregularity of the procedure adopted by respondents' counsel but also by the sophisms in which they indulge.

From a perspective viewpoint, the brief of respondents actually emphasizes the propriety of this Court assuming jurisdiction. They concede that the Federal statute (34 Stat. 269, section 3), upon which Petitioners found their claim of exemption has its counterpart in similar Federal enactments applying to nine other states (Brief, pp. 16-17). But the gist of the argument of the respondents is to divert attention from the *statutory* exemption and to seek consideration of the controversy as though petitioners were urging an *inherent immunity*.

Although similar considerations of governmental policy support the Congressional right to legislate a statutory

exemption as those upon which is founded the doctrine of inherent immunity, the two legal questions are distinctly different.

It is upon this difference that the principal authorities which respondents cite are distinguishable from the instant case.

In *Spohn* v. *Stark, County Treasurer*, 197 Ind. 299, 150 N.E. 787, a claim was made that certain property *leased to the State* was exempt under a *State* statute. The Supreme Court of Indiana held that the statute providing for exemptions were based upon the *immunity of the owner* rather than upon *the use of the property itself*. The fact that the reasoning of the Indiana decision is contrary to the weight of authority, including Oklahoma itself (*Cox* v. *Dillingham*, 199 Okla. 161, 184 P.2d 976; *Board of Commrs.* v. *Tulsa Business College*, 150 Okla. 197, 1 P.2d 351) is quite immaterial to the issues here. If the Indiana statutes make ownership, rather than use, the test of the exemption, such is not controlling upon the construction of the intent of the Federal statute here involved.

The elementary inquiries here are (1) *the subject of the tax* from which exemption is sought, and (2) the factors which the statute makes determinative of the exemption which it prescribes.

Respondents seek to divert attention from these fundamental issues by injecting (1) the absence of the Federal Government as a party and its protection by the lease provision that "the lessor shall pay all taxes", (2) the fact that the Government is leasing "the building only and not

the real estate", and (3) the element of profit to the lessors, surreptitiously asserting—*de hors* the record and contrary to fact—that petitioners "operate" the property,

As to the first of these, it should be noted that the Federal statutory provision here involved does *not* purport to exempt *the Federal Government,* which is inherently immune anyhow. It states that "no taxes shall be imposed by the State on LAND or PROPERTY". And, under Oklahoma law, the tax here at issue is levied upon *property in rem,* including all interests therein. (68 Okla. Stat. 1951, Sec. 15.3; *Davis* v. *Taylor,* 194 Okla. 565, 153 P.2d 231.) The Oklahoma tax is wholly unconcerned with the element of ownership, as is the Federal statute in declaration of the exemption.

The wisdom or lack of prudence in restricting consideration to the property itself is not a matter of judicial concern unless the power of Congress so to legislate be drawn into question—and if that be done, the assumption of jurisdiction by this Court becomes virtually imperative. It is conceded that no *inherent immunity* extends to property belonging to a Federal instrumentality (*Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore,* 195 U.S. 375), but the Congressional authority affirmatively to legislate an exemption of such property transfers the judicial inquiry to an entirely different facet of constitutional law. (See: *United States* v. *Allegheny County,* 322 U.S. 174; *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U.S. 95; and *Pittman* v. *Home Owners' Loan Corp.* 308 U.S. 21).

The presence or absence of the Federal Government as a party to this litigation can have no bearing upon the

determination of whether or not the Federal statute exempts the property itself.

The holdings in *Ken Realty Company* v. *Johnson, Treasurer*, 138 F.2d 809, in *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore, supra*, 195 U.S. 375, in *Heiner* v. *Colonial Trust Co.*, 275 U.S. 232, and in *Boss* v. *Polk County*, 236 Iowa 894, 19 N.W.2d 225, all were concerned with *inherent immunity;* none of them even considered a Federal statutory provision such as is contained in the Oklahoma Enabling Act, for no such statute was there involved.

It was both misleading and unfair of counsel for the respondents to assert (Brief, p. 18) that petitioners had not presented to the Oklahoma Supreme Court the contention that petitioners were entitled to the benefit of the exemption as an incident of their ownership of the property. The very foundation of the litigation is the complaint of the petitioners that the State was seeking to subject their title to a cloud prohibited by a Federal statute.

Opposing counsel appear to have reverted to long-abandoned 19th Century concepts in their remarks about "white" and "Indian" owners of property when seeking to distinguish the controlling effectiveness of *Choate* v. *Trapp*, 224 U.S. 665; *Ward* v. *Board of County Commrs. of Love County*, 253 U.S. 17, and *Carpenter* v. *Shaw*, 280 U.S. 363. Even a superficial examination of those decisions will disclose that the persons complaining of the attempted taxation were *not* asserting their exemption as Indian wards of the Federal Government or seeking to capitalize upon any doctrine of "white guardianship." They were advancing a Congressional statutory exemption which inured to

them as citizens *sui juris*, an exemption inhering in their ownership of property shielded from the impact of the State taxing power by Federal law.

As in those cases, the element of profit to the owner of the property is as immaterial as the identity of the owner. It is the *rem* itself which is declared to be exempt; and if the State desires to reach the profits, it must select *them* as the subject of the tax, leaving any claim for exemption of *that subject* to determination of whether or not an *immunity* or a *different* statutory exemption exists.

As to the claim of the respondents that the Government is leasing "the building only and not the real estate", they apparently disregard the non-Federal holding of the Oklahoma Supreme Court in this very litigation (Petition for Writ of Certiorari, Appendix, p. iv). The Oklahoma Court held that the failure of a lease to cover the entire of an assessed unit would not operate to prevent the operation of an exemption of a portion of the property if the exemption were valid.

And, in this connection, it should be noted that the wording of the Federal statute here under consideration is not limited to real estate alone. The prohibition is against State taxation of "LAND OR PROPERTY." So, since the property rights in the building are included in the single assessment of the real estate as a unit, as heretofore shown, respondents cannot evade the effectiveness of the Federal statutory exemption of the Federally-used building by the subterfuge of ignoring the element of value of the improvements in the single assessment made.

As to the surreptitious injection of the idea that Petitioners are "operating" the property (Brief, p. 2), we need only repeat the remark made in the Petition for Writ of Certiorari—it would be quite appropriate to speculate on the dire consequences to the petitioners should they attempt to exercise any privileges (even incident to "operation") in the premises leased to the Post Office Department.

In conclusion, it should be pointed out that the "charitable use" decisions advanced by the respondents, and the Oklahoma *statute* (68 Okla. Stat. 1951, Sec. 152), seeking to limit the Oklahoma constitutional exemption (Okla Const. Art. X, Sec. 6) of charity-used property, merely serve to emphasize the propriety of plenary consideration of this litigation.

The meaning and scope of the *Federal statutes*—not a State statute or constitutional provision—are the issues here. Whether the Federal statutes, of which the Oklahoma Enabling Act is only one, made the *property* the *subject* of the exemption and made the *use* (or reservation for use) the *classification determinant* unquestionably is a Federal question of widespread effect; and a denial of a Writ of Certiorari would leave undetermined the legal principles which so vitally affect the amount of lease rentals which the United States will be obliged to pay for property which it ill can afford to purchase.

These counsel believe that, on plenary consideration after complete briefing and argument, the efficacy of the exemption as claimed can be established to the satisfaction of the Court. But, even if this could not be done, denial of the writ without such consideration would leave un-

restrained the multiplicity of litigation inevitably engendered by the Oklahoma Supreme Court decision on this question of first impression.

Respectfully submitted,

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February, 1959.